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No. 82-418

In the Supreme Court of the United States

OCTOBER TERM, 1982

GAIU LOCAL 13-B, GRAPHIC ARTS INTERNATIONAL UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether a union violates Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by disciplining employee members who refrain from engaging in unprotected concerted activity for which they may be lawfully discharged or otherwise disciplined by their employer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 682 F.2d 304. The decision and order of the National Labor Relations Board (Pet. App. 21a-38a) are reported at 252 N.L.R.B. 936.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on June 11, 1982. The petition for a writ of certiorari was filed on September 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 39a-41a.

STATEMENT

1. Since 1952, petitioner has represented some 500 production and service employees at Western Publishing Co.'s Poughkeepsie, New York, plant, one of several printing facilities operated by Western in the United States. In April 1978, petitioner and Western commenced negotiations for a new contract to replace the collective bargaining agreement that was due to expire on May 16, 1978. Negotiations continued until September 1979, without reaching an agreement (Pet. App. 22a).

Throughout the period of the contract negotiations, the employees were obligated under the terms of their employment to perform overtime work assigned by their employer (Pet. App. 23a n.4). On July 14, 1978, Western issued formal reprimands to various employees who refused direct orders to work overtime (Pet. App. 23a) and warned them "that any future unexcused refusal on your part to work assigned overtime will subject you to disciplinary action, up to and including suspension or discharge" (C.A. App. 46-56, 108, 110, 111).[1] Certain other employees, who had previously refused to work mandatory overtime, were issued one-day suspensions (Pet. App. 23a). Western advised these employees that the date of the suspension "will be designated by the Company to minimize interference with production" (C.A. App. 44, 45); the suspensions have been held in abeyance pending resolution of this case (Pet. App. 23a n.3).

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[1] "C.A. App." denotes the appendix filed in the court of appeals.

The employees became upset about the slow pace of the contract negotiations, and on August 28, 1978, in an effort to pressure Western to make economic concessions, the Union adopted a rule preventing its members from performing mandatory overtime work (Pet. App. 23a, 25a-26a, 28a-29a). The rule was adopted at a special union meeting attended by 320 of the 500-odd unit members. Of those present, 220 voted for and 100 against imposing the overtime ban (*id.* at 25a-26a). The Union's "Work Rules" announcing the ban, subsequently posted throughout the plant, stated (Pet. App. 23a):

1. No overtime shall be worked by any member of Local 13-B Poughkeepsie G.A.I.U.
2. Established shift and starting times in effect August 28, 1978 shall not be changed.
3. Failure to comply with these rules and any disciplinary action and/or discharge of any member of Local 13-B for the observance of these work rules shall be considered an action taken against all of the members and will be treated by the Local as a lock out.

On August 30, 1978, the Company notified its employees that all overtime would be immediately discontinued "since it was reported to us that employees were being threatened with fines should they work any overtime" (Pet. App. 23a). Because of the needs of one of its largest customers, however, the Company, on October 17, 1978, notified its employees that mandatory overtime would be reinstituted the following weekend. The Company stated that, although it had a legal right to discipline employees who refused to work overtime, it did not intend to do so, but that it intended to accomplish the work with nonunit employees if necessary (Pet. App. 23a). On October 21, 1978, the Company reinstated its mandatory overtime policy (*ibid.*).

On or after October 21, 1978, at least 17 unit employees who were union members performed compulsory

overtime work in contravention of the Union's rule banning such work (Pet. App. 23a-24a). On October 25, the Union began disciplining these employees with union penalties of one day's pay plus a $50 fine for each day of overtime worked (*id.* at 24a & n.5).[2] In addition, the Union sued at least two employees in state court to collect unpaid overtime fines, as well as attorneys' fees for bringing the suits (Pet. App. 24a & n.5).

2. Upon charges filed by one of the employees who had been disciplined by the Union, the Board found that petitioner's enforcement of its overtime ban violated Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), because it required employee members to engage in an unprotected "partial strike" for which they could lawfully be discharged or disciplined by their employer (Pet. App. 26a-29a). The Board rejected petitioner's defense— which had been accepted by the Administrative Law Judge (Pet. App. 28a)—that the ban was enacted in protest of unfair labor practices allegedly committed by Western and, for this reason, did not fall within the rule that the repeated refusal of employees to perform mandatory overtime is a partial strike unprotected by Section 7 of the Act, 29 U.S.C. 157. Rather, on the facts presented, the Board found that, notwithstanding

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[2] On October 25, 1978, the Union also filed an unfair labor practice charge alleging that the Company had failed to bargain in a good faith effort to reach agreement and had improperly attempted to bypass the Union by communicating directly with employees (Pet. App. 24a). On December 18, 1978, the Union filed a second unfair labor practice charge alleging that the Company had engaged in bad faith bargaining and had unlawfully implemented unilateral changes in work conditions without a valid impasse in bargaining (*ibid.*). The Board's Regional Director subsequently issued a complaint on the Union's charges. In September 1979, however, the Regional Director approved a formal settlement agreement between the Company and the General Counsel. The Union did not enter into or approve this settlement (Pet. App. 24a n.6).

Western's alleged unfair labor practices during the bargaining (see page 4 n.2, *supra*), "the employees voted to impose the overtime ban solely as a bargaining tactic, designed to put economic pressure on Western and to force Western to make bargaining concessions * * *" (Pet. App. 28a). Accordingly, the Board found it "unnecessary to pass on the question of whether a different result would obtain had the employees been protesting unfair labor practices committed by their employer" (*ibid.*).[3]

The Board's order requires the Union to cease and desist from the unfair labor practice found and from violating the Act in any like or related manner. Affirmatively, the Board's order directs the Union to rescind all disciplinary action against the 17 members who resisted its overtime ban; to compensate them for any losses suffered as a result of its unlawful conduct, including the refund of any fines assessed against them, plus interest; to post the customary notice reflecting the Board's order at its offices and meeting halls; and to send a signed copy of the notice to the Company for posting, if the Company is willing to do so (Pet. App. 29a-32a).

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[3] In finding petitioner's defense factually unsupported, the panel majority noted that "we particularly rely on the fact that the overtime here in question was mandatory and lawfully imposed" (Pet. App. 28a n.16). Characterizing it as "incorrectly decided," the majority disclaimed reliance on *Valley City Furniture Co.*, 110 N.L.R.B. 1589 (1954), enforced, 230 F.2d 947 (6th Cir. 1956), which held recurrent refusals to work overtime to be unprotected activity even though done in direct response to the employer's unlawful change in work hours.

Board Member Pennello, in a concurring opinion (Pet. App. 32a-36a), found it unnecessary to distinguish *Valley City Furniture* from the present case, because in his view even unlawful acts by the employer do not entitle a union to resort to a partial strike, except where, unlike here, the employees' conduct consists of "nothing more than noncompliance with an unlawfully instituted rule" (*id.* at 34a).

2. On review, the court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-18a). The court found that substantial evidence supported the Board's finding that petitioner's "overtime ban was not adopted in response to the Employer's alleged unfair labor practices but solely as an economic weapon to improve the Union's bargaining position in ongoing negotiations" (Pet. App. 12a).[4] In agreement with the Board, the court held that, because the employee members who honored petitioner's overtime ban could lawfully be discharged by their employer, petitioner's forcing their participation in the ban impermissibly restrained their right to engage in or refrain from union activity without jeopardizing their jobs (Pet. App. 6a-11a).

ARGUMENT

1. The first issue presented by the petition—whether Section 7 of the National Labor Relations Act, 29 U.S.C. 157, protects employees who, in order to pressure their employer to grant economic concessions, work only their regular hours and refuse to carry out their normal duty to perform overtime work—is not properly raised here. In the proceedings before the Board, petitioner did not question the rule—long applied by the Board and the courts of appeals—that the right to engage in concerted activity protected by Section 7 of the Act does not preclude employers from

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[4] The court of appeals rejected petitioner's contention that, because of erroneous evidentiary rulings by the Administrative Law Judge, petitioner was denied a fair opportunity to make out its defense that its overtime ban was a protest of unfair labor practices by the employer. The court ruled that petitioner had not raised this objection before the Board and was therefore barred from raising it on judicial review and that, in any event, consideration of the excluded evidence would not cause "appreciable likelihood of any change in the result" (Pet. App. 13a-18a).

discharging or otherwise disciplining employees who, in order to extract economic benefits, engage in "partial strikes," including refusing to perform overtime work assigned to them by their employer.[5] Instead, petitioner sought to avoid this rule on the ground that its overtime ban was a protest of the employer's alleged unfair labor practices and for this reason only was protected by Section 7 (C.A. App. 167-173). The Board rejected this contention on factual grounds, and the reasonableness of its fact findings was sustained by the court of appeals (Pet. App. 12a-13a, 28a).

In these circumstances, Section 10(e) of the Act, 29 U.S.C. 160(e), prevents judicial consideration of petitioner's belated contention that the overtime ban should be held to be protected activity even if not in protest of unfair labor practices. See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. Even assuming arguendo "that case-by-case adjudication by the federal Board will ultimately result in

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[5] See *C.G. Conn, Ltd.* v. *NLRB*, 108 F.2d 390, 397 (7th Cir. 1939); *NLRB* v. *Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946); *Home Beneficial Life Insurance Co.* v. *NLRB*, 159 F.2d 280 (4th Cir.), cert. denied, 332 U.S. 758 (1947); *NLRB* v. *Blades Manufacturing Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965); *John Swift Co.*, 124 N.L.R.B. 394, 396-397 & n.4 (1959), aff'd 277 F.2d 641, 646 (7th Cir. 1960). See also *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972).

As stated by the Seventh Circuit in *C.G. Conn, Ltd.* v. *NLRB*, *supra*, 108 F.2d at 397, such activity is unprotected because "[w]e are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment."

the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case * * * are 'protected' activities within the meaning of § 7, * * *" *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 152 n.14 (1976), the predicate for such a development is a timely raising of the issue before the agency with the primary responsibility of "applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). That predicate is absent in this case.[6]

2. The second issue raised by the petition—whether a union violates Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by disciplining employee members who refrain from engaging in unprotected concerted activity for which they may lawfully be discharged by their employer—was correctly decided below. The decision of the court of appeals is not in conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

a. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a union to "restrain or coerce" employee-members in the exercise of their rights under

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[6] In *Lodge 76, The International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. at 152-153 n.14, the Court noted evolving Board case law limiting the partial strike rule to situations where overtime was mandatory and finding that refusals to work voluntary overtime were protected. See *Dow Chemical Co.*, 152 N.L.R.B. 1150, 1151-1152 (1965); *Prince Lithograph Co.*, 205 N.L.R.B. 110, 115 (1973). In the present case, as the Board noted, allegations that the overtime here was voluntary were dropped and the parties stipulated that overtime was mandatory (Pet. App. 23a n.4). Before the court of appeals, petitioner conceded (Reply Br. 6) that the Board's reliance on the mandatory nature of the overtime here (Pet. App. 28a n.16) was proper.

Section 7, 29 U.S.C. 157, which include the right to engage in or refrain from concerted activities. But, a proviso to Section 8(b)(1)(A) preserves to the union the right "to prescribe its own rules with respect to the acquisition or retention of membership therein." Based on the legislative history of the section, including the proviso, this Court has determined that Section 8(b)(1)(A) "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969). Although unions thus have considerable freedom to require their members to abide by union rules, "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *NLRB*, *supra*, 394 U.S. at 429. Accord, *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers of America*, 391 U.S. 418, 424 (1968).

b. The "policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40 (1954), and the relevant statutory provisions are "designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood" (*ibid.*). Consistent with this policy, the proviso permitting unions to regulate their own internal affairs was not intended to permit " 'enforcement of a union's internal regulations to affect a member's employment status.' " *Scofield* v. *NLRB*, *supra*, 394 U.S. at 428, quoting *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 195 (1967). Accordingly, just as a union is normally precluded from directly causing an employer to discharge an employee member for refusing to ad-

here to union rules, see *Radio Officers' Union* v. *NLRB*, *supra*, 347 U.S. at 40-42; *Printz Leather Co.*, 94 N.L.R.B. 1312, 1313, 1323-1329 (1951), so here it is contrary to statutory policy to permit petitioner to enforce a rule requiring employee members to engage in conduct that is cause for discharge. As the court of appeals explained (Pet. App. 9a-10a; citations omitted):

> A union rule requiring an employee to engage in such unprotected activity, even though adopted by a majority of the union's members, amounts to an unlawful restraint or coercion on its employee-members. It forces them, it[sic] they wish to continue working, to engage in unlawful activity and to risk being lawfully discharged by their employer or subjected to lawful imposition of disciplinary measures. An employee who engages in lawful strike activity retains his accrued rights, § 2(3) of the Act, 29 U.S.C. § 152(3), and is entitled to reinstatement upon conclusion of the strike unless the employer shows legitimate reasons to the contrary * * *. However, an employee discharged for misconduct in violation of the terms of his employment may be denied reinstatement * * *. For these reasons, this type of economic coercion on the part of a union, forcing members to engage in unprotected activity, is impermissible since it jeopardizes the members' employment relationships, imperils their livelihood, and impairs our national labor policy. * * * Nor may such a union rule be saved on the ground that the employee who wishes to avoid unprotected activity may leave the union and escape the rule. A rule which is inconsistent with our national labor policy must give way.[7]

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[7] The union rule sustained in *Scofield*, unlike the rule here, did not require employee members to engage in conduct for which they could be discharged for cause. *Scofield* emphasized that the employer had never disciplined employees who abided by the union's longstanding rule setting a ceiling on production and indeed that the employer had not only signed contracts

c. The result reached by the Board and the court of appeals is consistent with *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), and *Lodge 76, The International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, *supra*, 427 U.S. 132. Neither of those cases considered the issue of *employee* rights presented here—namely, whether a union may discipline employee members who refrain from engaging in an unprotected partial strike. In *Insurance Agents'*, The Court merely held that unprotected union activity used as a form of economic pressure (e.g., work stoppages, " 'slow-down,' 'sit-in,' and arguably unprotected disloyal tactics") for which "the employer could have discharged or taken other appropriate disciplinary action against the employees" (361 U.S. at 493-494), did not constitute a refusal to bargain in good faith in violation of Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3). In *Lodge 76*, the Court simply held that the Act preempts state regulation of the use of an overtime ban as an economic weapon. Indeed, the Court specifically noted that it was not ruling on the question whether the overtime ban there was "protected" under Section 7 of the Act, and added that the employer would in any event have countervailing economic weapons available, including "discharg[ing] or tak[ing] other appropriate disciplinary action against the employees participating" in the refusal to work overtime (427 U.S. at 152-153 & n.14).

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recognizing the rule but also had cooperated in its administration (394 U.S. at 432-433). In these circumstances, as *Scofield* recognized, "the price of obeying the rule" was not even as high as that in an ordinary strike, during which employees can be replaced for refusing to work (*id.* at 435). Here, by contrast, the employer has never abandoned its right to discipline employees for refusing mandatory overtime work; thus, the "price of obeying the rule" could well be complete job loss without any reinstatement rights.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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